`UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

RAMON ARMAS BORROTO, JR.

Plaintiff,

vs. **Case No. 5:04CV165-RH/WCS**

L. MCDONALD, PATE, SPEIGHT, MCKENZIE and KENT.

Defendants.
_____/

Defendants' Objections to Report and Recommendation

Pursuant to 28 U.S.C. s. 636(b)(1), Defendants McDONALD, PATE, McKENZIE, and KENT, through undersigned counsel, object to the findings and recommendations of the Magistrate (Doc. 70) as follows:

1. The Magistrate errs in by finding a viable Eighth Amendment claim where Plaintiff demonstrates no more than a de minimis injury;

2. The Magistrate errs in finding that Plaintiff is entitled to pursue a claim for punitive damages where Plaintiff presents no physical injury; and

3. Plaintiff's implausible inferences and presentation of no more than a scintilla of evidence fails to carry his burden in summary judgment.

Background

Plaintiff has alleged that, on November 28, 2002, while in the presence of Defendants Kent, Pate, and McKenzie, Defendant McDonald punched him in the stomach many times, then punched him in the ear and on his head, and then "placed Plaintiff's

head between his legs," grabbed Plaintiff "around his waist," "picked the Plaintiff up off the ground and dropped Plaintiff on his head." Doc. 19, at p. 8.

Defendants, however, have submitted a motion for summary judgment with evidence demonstrating that:

1) Plaintiff's physical condition as documented by his medical record was inconsistent with Plaintiff's astounding allegation of being "dropped" or "slammed" on his head, see doc. 62, Ex. F & G.

2) When Nurse Conger examined Plaintiff *several hours after Plaintiff alleged the incident took place*, she indicated that Plaintiff was found to only have a small edema or mark on the rear of his head and slight bruising and redness on his left ear lobe. The Nurse's assessment of Plaintiff on discharge was "good." See Doc. 62; Ex. F.

3) Although Defendant Kent does not remember Plaintiff specifically, she has averred that she did not witness a physical assault upon Plaintiff by Officer McDonald as described by Plaintiff - an encounter which if true certainly would have manifested itself as an indelible memory. See Doc. 68, Ex. X.

4) Inmates are aware that allegations of physical abuse will often result in a transfer. See doc. 68, Ex. Y. Plaintiff made several attempts to obtain a transfer through various means including making a "cut on his wrist," and conspiring with another inmate to concoct a scenario by which he could "check in," under the pretense that he needed protection. Doc. 67, pg. 3; see also Doc. 62; H-1; V-4.

Further, the record reflects that accounts of the incident and Plaintiff's "injuries" given by Plaintiff and recorded by non-Defendants differ as follows:

i) On November 29, when Plaintiff first reported the incident to staff he stated:

> Officer MacDonald began to punch me in my stomache [sic]. He did this many times. Then punch me in my ear and head. He put my head between his legs, picked me up and *slammed* me on my head.

Doc. 62, at Ex. E (emphasis added).

ii) On November 29, however, as recorded by Nurse Conger, Plaintiff alleged only that he was hit on the back of head, ears, and abdomen. No mention is made of any allegation of Plaintiff being "picked up"or "dropped" or "slammed" on his head. See Doc. 62, at Ex. F.

iii) On December 4, 2002, Plaintiff alleged that "voices" told him to swallow a razor blade. See Doc. 62, at Ex. I. Plaintiff tells medical staff that he has abdominal pain *because of the razor blade he swallowed.* See Doc. 62, at Ex. I (emphasis added).

iv) On December 4, 2002, slight discoloration of Plaintiff's ear was noted by Nurse Bigler but Bigler notes that Plaintiff "did not elaborate what was wrong with ear." See Doc. 62, at Ex. J-2.

v) On December 6, 2002, Plaintiff reports to staff that he was hit in the stomach, head, and ear by Officer McDonald on Thanksgiving morning. See Doc. 62, at Ex. Q-1. Again, no mention is made of any allegation of Plaintiff being "picked up" or "dropped" or "slammed" on his head. See Doc. 62, at Ex. Q-1.

vi) In the course of this litigation, Plaintiff concedes that there were "no marks on Plaintiff's abdomen" and attributes that to Defendants McDonald and McKenzie having become "learned in how to assault by strategically punching areas which will leave no marks." See Doc. 67, at p. 2. Yet, Plaintiff had not previously alleged being struck by Defendant McKenzie.

vii) In the course of this litigation, Plaintiff has conceded his "injuries" were "not life threatening." See Doc. 67, pg. 2 & 4.

viii) In the course of this litigation, Plaintiff makes a new allegation that he was masturbating while he spoke to Nurse Kent at his cell door. See Doc. 67, pg. 2 & 5. In an earlier affidavit Plaintiff attributes no motive for the alleged assault. See Doc. 62, Ex. E (affidavit given by Plaintiff on November 29, 2002).

ix) Most significantly, Plaintiff now states that:

> . . .The defendant claim that being on one's head would result in a fracture, or at least swelling or significant bruising. The plaintiff was dropped on his head. Once his head hit the ground *it slid forward.* The plaintiff could not see if he had a bruise on his head but the plaintiff head and neck hurt. Defendant's claim is unsubstantiated *because it would all depend on how far from the ground he was dropped, and the point of impact of where his head hit the ground.*

Doc. 69, at p. 7. In this, Plaintiff essentially retreats from his allegation that he was "slammed" to the floor. He now qualifies his "dropping" allegation with vague references to distance from the floor, his head sliding "forward," and "point of impact." Doc. 69, at p. 7.

Argument

I. The Magistrate errs in finding a viable Eighth Amendment claim where Plaintiff demonstrates no more than de minimis injury.

The Magistrate has rejected Defendants' argument that Plaintiff has not shown an Eighth Amendment violation because Plaintiff has not shown more than a de minimis injury. Doc. 70, at pg. 5. In review of Defendants' Motion for Summary Judgment, the Magistrate finds Plaintiff's "injuries" to consist of "a few bruises" that "are not significant." Doc. 70, pg. 8. Yet, the Magistrate states, "assuming that Plaintiff tells the truth, beating a handcuffed prisoner and slamming his head on the floor causing pain, with no legitimate purpose other than to cause pain, violates the Eighth Amendment even though the injuries, a few bruises, are not significant." Doc. 70, at pg. 8 (emphasis added).

A violent assault in prison is simply not part of the penalty that criminal offenders pay for their offenses against society. See Valdes v. Crosby, 450 F.3d 1231 (11th Cir. 2006). However, Defendants have demonstrated that no assault took place. The failure of Plaintiff to allege more than a de minimis injury constitutes a failure of the Plaintiff to meet the objective component of the Eighth Amendment test.

The Eleventh Circuit has stated that for purposes of evaluation under the Eighth Amendment, an injury can be 'objectively, sufficiently serious' **only** if there is **more than** de minimis injury." Boxer X v. Harris, 437 F.3d 1107, 1111 (11th Cir. 2006)(emphasis added)(motion for rehearing, en banc denied, Boxer X v. Harris, 2006 U.S. App. LEXIS

20396, 19 Fla. L. Weekly Fed. C 940 (11th Cir. Ga. Aug. 9, 2006), (citing Johnson v. Breeden, 280 F.3d 1308, 1321 (11th Cir. 2002)). In Boxer X, the Eleventh Circuit concluded that a female prison guard's solicitation of a male prisoner's manual masturbation, even under the threat of reprisal, "does not present more than de minimis injury." Boxer X , 437 F.3d at 111. The Court affirmed the dismissal of Boxer's claim under the Eighth Amendment, despite Boxer's allegation of impropriety by the female prison officer. 437 F.3d at 111. The Boxer X opinion was recently considered for rehearing en banc, and further review was denied. 2006 U.S. App. LEXIS 20396.

Certainly, Defendants are aware that de minimis injury is not a single litmus test for Eighth Amendment violations, and that Courts have not foreclosed relief under the Eighth Amendment where physical injury is absent. See Hudson v. McMillian, 503 U.S. 1, 7, 112 S.Ct. 995, 999 , 117 L.Ed. 2d 156 (1992). However, the instant case - alleged beating and dropping of Plaintiff on his head- does not fall in the class of abuse or torture inflicted so ingeniously that they cannot be discerned by evidence of physical injury. In Johnson v. Moody, considered 2006 U.S. Dist. LEXIS 19486, 17-18 (D. Ala. 2006), adopting Report and Recommendation in 2006 U.S. Dist. LEXIS 19480, *), a federal district court in Alabama explained that the excessive use of force claim before it - allegation that the officer slammed the tray door of his prison cell on plaintiff's right hand, thereby cutting his finger (witnessed by another officer who failed to protect him) - was not one that contained "allegations of torture designed to inflict extreme pain without

leaving tangible injury or conduct that otherwise is so egregious that one could reasonably call it repugnant to the conscience of mankind." 2006 U.S. Dist. LEXIS 19486, *17. As such, "if plaintiff suffered only de minimis injuries, that would be an important factor in determining whether more than de minimis force was used." 2006 U.S. Dist. LEXIS 19486, *17-18. Further, Plaintiff's allegations of intent were considered by the Johnson Court. According to the Court ,

> . . . .Assuming, as plaintiff alleges, *that Officer Moody intentionally kicked the door on his hand*, cutting his finger, his injury, if any, was temporary and [*23] de minimis and simply does not support his claim that he was subjected to anything other than de minimis force, which is insufficient to establish a constitutional violation under the Eighth Amendment.

Johnson v. Moody, 2006 U.S. Dist. LEXIS 19486, 22-23 (D. Ala. 2006). In the same vein, given the trauma alleged by Plaintiff, a sustainable Eighth Amendment claim would be logically supported by the objective evidence of a more than de minimis injury. See Boxer X v. Harris, 437 F.3d 1107, 1111.

This case is like Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997). In Siglar, the Court held that "Siglar's alleged injury--a sore, bruised ear lasting for three days--was de minimus" and that "Siglar has not raised a valid Eighth Amendment claim for excessive use of force." Siglar, 112 F.3d at 193. The Magistrate, however, appears to indicate that Siglar does not control because the facts of Siglar do not present a sufficient level of maliciousness. However, the facts of Siglar indicate that allegations of

maliciousness were present before the Court, as follows:

> Nwose responded to Whitehead's call and verbally and physically abused Siglar during the incident. *Without provocation*, Nwose twisted Siglar's arm behind his back and twisted Siglar's ear.

Siglar, 112 F.3d at 193 (emphasis added).

This case is not like Gomez v. Chandler, 163 F.3d 921 (5th Cir. 1999), in that the summary judgment evidence is different. In Gomez, the record contained the record of:

> an approximately 4 1/2 " by 5 1/2 " photograph, depicting the subject (apparently Gomez) from approximately mid-thigh up, *on which there is easily seen a marking on the right forehead, which appears rather larger than one centimeter in diameter and looks like some sort of contusion or abrasion.*

Gomez, 163 F.3d 922. In other words, the evidence showed more than de minimis injury, unlike the case at bar. As the Court in Gomez stated, "[w]e need not resolve this possible question because we hold that on this record Gomez *has made a sufficient showing of a more than de minimis physical injury so as to preclude summary judgment to the contrary*." Gomez, 163 F.3d at 924, n. 4.

In the instant case, Plaintiff has no evidence such as the photograph presented in Gomez showing an easily discernible marking that looks like some sort of contusion. Rather, the record demonstrates that when Nurse Conger examined Plaintiff *several hours after Plaintiff alleged the incident took place*, she indicated that Plaintiff was found to only have a small edema or mark on the rear of his head and slight bruising and redness on his left ear lobe. *Her assessment of Plaintiff on discharge was "good."* See Doc. 62;

Ex. F. Wherefore, the Magistrate errs in finding a viable Eighth Amendment claim in light of the totality of the record and failure on the part of the Plaintiff to demonstrate more than a de minimis injury.

II. The Magistrate errs in finding that Plaintiff is entitled to pursue a claim for punitive damages where he presents no physical injury.

Despite finding that Plaintiff's "injuries" did not "meet the definition of 'physical injury' for purposes of section 1997e(e) as construed in Harris v. Garner," (Doc. 70, at pg. 10) the Magistrate found that Plaintiff is not precluded from seeking punitive damages. Doc. 70, at p. 15. Yet, other judges of this District have recently stated jurisprudence to the contrary. In Nesbitt v. Fla., 2006 U.S. Dist. LEXIS 38392, 10-11 (D. Fla. 2006), another Magistrate of this District stated:

> The Eleventh Circuit has decided that the phrase "Federal civil actions" means all federal claims, including constitutional claims. Napier v. Preslicka, 314 F.3d 528, 532 (11th Cir. 2000) (citing Harris v. Garner, 216 F.3d 970, 984-85 (11th Cir. 2000) (en banc)). In order to satisfy section 1997e(e), a prisoner must allege more than a de minimis physical injury. Harris v. Garner, 190 F.3d 1279,1286-87(11th Cir. 1999), reh'gen banc granted and opinion vacated, 197F.3d 1059(11th Cir. 1999), opinion reinstated in pertinent part en banc, 216 F.3d 970 (11th Cir. 2000)) ("We therefore join the Fifth Circuit in fusing the [*11] physical injury analysis under section 1997e(e) with the framework set out by the Supreme Court in Hudson [v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992)] for analyzing claims brought under the Eighth Amendment for cruel and unusual punishment, and hold that in order to satisfy section 1997e(e) the physical injury must be more than de minimis, but need not be significant."); Osterback v. Ingram, 13 Fla. L. Weekly D 133, 2000 WL 297840 (N.D. Fla. 2000), aff'd. 263 F.3d 169 (11th Cir. 2001) (Table), cert, denied. 536 U.S. 906, 122 S. Ct. 2362, 153 L. Ed. 2d 183 (2002) (holding that a prisoner plaintiff may not recover compensatory or punitive damages

> for mental or emotional injury without establishing that he suffered more than de minimis physical injury).
>
> In the instant case, the only relief Plaintiff seeks is $ 20,000,000 in compensatory damages and $ 80,000,000 in *punitive damages*. *He has not alleged any physical injury arising from Defendants' actions, therefore*, Plaintiff is not entitled to the relief he seeks.

2006 U.S. Dist. LEXIS 38392, 10-11 (Northern District of Florida, June 9, 2006 (opinion of Magistrate Elizabeth Timothy))(emphasis added).[1]

The Middle District of Florida has offered the following jurisprudence when

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[1] Indeed, the Magistrate of the instant case has previously explained the holding of Harris as follows:

> . . .Thus, the most significant question posed by the wording of § 1997e(e), that "no Federal civil action may be brought," has been resolved in this circuit. Despite the way it is worded, the statute limits the types of relief, not causes of action. *If there is no "physical injury" alleged, then mental or emotional monetary damages, as well as punitive damages, cannot be recovered*, but declaratory and injunctive relief may be available.

Kemner v. Hemphill, 199 F. Supp. 2d 1264, 1265-1266 (D. Fla. 2002)(emphasis added).

In Wilson v. Moore, 270 F. Supp. 2d 1328, 1332 (D. Fla. 2003), the Magistrate wrote:

> Plaintiff requested both compensatory and punitive damages as relief. Doc. 27. However, there are no allegations of physical injury or harm to Plaintiff [**5] and, without physical injury, Plaintiff's request for monetary damages must necessarily be limited to nominal damages by virtue of 42 U.S.C. § 1997e(e). Harris v. Garner, 216 F.3d 970 (11th Cir. 2000) [footnote omitted], reinstating in part 190 F.3d 1279 (11th Cir. 1999); Osterback v. Ingram, et al., No. 00-10558, 263 F.3d 169 (11th Cir. 2001) (Table).

adjudicating availability of compensatory and punitive damages. :

> In Harris, the Eleventh Circuit fused the physical injury analysis under section 1997e(e) with the framework set out by the Supreme Court in Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), [*8] for analyzing prisoner civil rights claims. Harris v. Garner, 190 F.3d 1279 (11th Cir. 1999), vacated by, 197 F.3d 1059 (11th Cir. 1999), and reinstated in relevant part by, 216 F.3d 970 (11th Cir. 2000). Thus, in order to satisfy section § 1997e(e), a prisoner seeking monetary damages for mental or emotional injury must demonstrate more than de minimus "physical injury." Harris, 190 F.3d at 1286-87.

Ross v. Gee, 2006 U.S. Dist. LEXIS 57315, 7-8 (Middle District of Florida, 2006).

Defendants acknowledge that in Boxer X v. Donald, 169 Fed. Appx. 555, 558, n.1 (11th Cir. 2006), a panel of the Eleventh Circuit (Birch, Black, and Barkett, Circuit Judges) wrote in a footnote that "Harris, however, does not resolve the question of punitive damages, observing that the PLRA 'only precludes some actions for money damages.' 190 F.3d at 1288." At the same time, the Boxer X v. Donald opinion did not fully consider the punitive damages question because it found Boxer's constitutional claims meritless. See Boxer X v. Donald, 169 Fed. Appx. at 559.

By the same token, in Asad v. Crosby, 158 Fed. Appx. 166 (11th Cir. 2005), the Appellant/Plaintiff appealed a Rule 12(b)(6) dismissal of his claims for compensatory and punitive damages. A different panel of the Court stated in a footnote:

> Pursuant to 42 U.S.C. § 1997e(e), "no Federal action may be brought by a prisoner confined in a jail, prison, or other

> correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Asad does not assert any actual physical injury resulting from the defendants' conduct. **Accordingly, the district court did not err by dismissing his claims for** compensatory or **punitive damages**. Cf. Harris v. Garner, 216 F.3d 970, 984-85 (11th Cir. 2000) (en banc) (holding that "Federal civil action" in § 1997e(e) means all federal claims, including constitutional claims), reinstating in part 190 F.3d 1279 (11th Cir. 1999). To the extent that Asad is arguing that § 1997e(e) is inapplicable to his claim because he is not alleging an emotional or mental injury, Asad's failure to establish the violation of a fundamental constitutional right precludes any type of recovery, including recovery for nominal damages. Cf. Hughes v. Lott, 350 F.3d 1157, 1162 (11th Cir. 2003) (holding that § 1997e(e) does not preclude prisoner's recovery of nominal damages, even in the absence of actual physical injury, where prisoner establishes violation of a fundamental constitutional right).

Asad v. Crosby, 158 Fed. Appx. at 168, n. 1 (emphasis added)(TJOFLAT, DUBINA and MARCUS, Circuit Judges).

Accordingly, short of certifying this question to the Eleventh Circuit Court of Appeals for interlocutory review, this Court should follow the acknowledged *result* of Harris v. Garner, 190 F.3d 1279 (11th Cir. 1999) and Harris v. Garner, 216 F.3d 970 (11th Cir. 2000), which is consistent with the Congressional objectives in enacting the Prison Litigation Reform Act, and dismiss Plaintiff's claim for punitive damages as it has been recommended for the compensatory damages claim.

III. Plaintiff fails to carry his burden in summary judgment with implausible inferences and no more than a scintilla of evidence.

The Magistrate includes in his analysis a disclaimer that he operates under the assumption that Plaintiff is telling the truth. Doc. p.70, at 8. But this is no ordinary disclaimer attendant with a summary judgment analysis. The Magistrate acknowledges that "Defendants have produced significant other evidence to indicate that Plaintiff's claims are untruthful,..." - although he considers review of that evidence "not needed here." Doc. 70, at p. 4, n. 2.

Defendants contend that the record contains evidence that is relevant and necessary to evaluate of Plaintiff's incredible allegation that his head was "placed between" Officer McDonald's legs, and then "picked-up," and "dropped." The medical record evidence - which Plaintiff has not countered - shows that Plaintiff sustained no fracture, swelling, or significant bruising relative to this trauma alleged. Further, the record contains other discrepancies with this allegation in the form of Plaintiff's intermittent omissions of this particular allegation, see Doc. 62, at Ex. F; see Doc. 62, at Ex. Q, and Plaintiff's *own* subsequent retreat from the allegation in the form of vague references to distance from the floor, his head sliding "forward", and "point of impact." Doc. 69, at p. 7. In that the Magistrate has found that Plaintiff's claim contains the allegation that he was beaten and slammed on his head on the floor, see Doc. 70, at p. 8, an examination of the plausibility of Plaintiff's allegation in light of the evidence is

necessary for review of the summary judgment question.

Although all reasonable inferences are made in favor of the nonmoving party, a court need not permit a case to go to a jury when the inferences drawn from the evidence and upon which the nonmoving party relies are 'implausible.' Cuesta v. School Bd. of Miami-Dade County, 285 F.3d 962, 970 (11th Cir. 2002)(citations omitted). A mere "scintilla" of evidence in support of the nonmoving party's position is not sufficient; there must be evidence upon which a jury could reasonably find for the nonmoving party. Anderson, 477 U.S. at 252; see also Matsushita, 475 U.S. at 587 (there is no genuine issue for trial if record taken as a whole would not lead a rational trier of fact to find in favor of non-moving party). In other words, summary judgment is warranted against a nonmoving party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "The non-moving party cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions." Parish v. Lee, 2004 U.S. Dist. LEXIS 7056 (D. La. 2004) (emphasis added)[2](citing Williams v. Borough of West Chester, Pa., 891 F.2d 458, 460 (3d Cir. 1989), and Saunders v. Michelin Tire

[2] The undersigned has provided hard copies of the following opinions to Plaintiff in the service of Defendants' Objections due to her retrieval of these citations from LEXIS: Johnson v. Moody, 2006 U.S. Dist. LEXIS 19486 (D. Ala. 2006); Ross v. Gee, 2006 U.S. Dist. LEXIS 57315; Nesbitt v. Fla., 2006 U.S. Dist. LEXIS 38392 (D. Fla. 2006); Boxer X v. Donald, 169 Fed. Appx. 555 (11th Cir. 2006), Asad v. Crosby, 158 Fed. Appx. 166 (11th Cir. 2005); and Parish v. Lee, 2004 U.S. Dist. LEXIS 7056 (D. La. 2004).

Corp., 942 F.2d 299, 301 (5th Cir. 1991)).

Plaintiff's chief support for his allegations of abuse and the falsification of records - and the evidence relied upon in chief by the Magistrate - are Plaintiff's self-serving statements. Such evidence should not carry the day. In Asad v. Crosby, the plaintiff claimed that he was issued a false disciplinary report in as part of a conspiracy to retaliate against him. Asad, 158 Fed. Appx. at 173. The Eleventh Circuit, however, affirmed a grant of summary judgment to Defendants where Asad had offered no evidence, other than his own conclusory allegations, of an agreement to retaliate against Asad. Asad, 158 Fed. Appx. at 170-171.

The Eleventh Circuit has recognized the problem of factual discrepancies brought by prisoners in the judicial process and has supported dismissal of claims based on such discrepancies. See e.g. Bilal v. Driver, 251 F.3d 1346, 1350 (11th Cir. 2001). In Bilal, the district court wrote that the prisoner's allegations appear "so magnified and fantastic that the seriousness of plaintiff's alleged injuries should be discounted and his credibility called into question." 251 F.3d at 1350. "Summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." Crawford-El v. Britton, 523 U.S. 574, 600, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). Therefore, based upon the totality of the record, this Court should grant Defendants' motion for summary judgment.

CONCLUSION

WHEREFORE, For these reasons, Defendants object to the Magistrate's findings and recommendations as set forth above.

Respectfully submitted,
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ATTORNEY GENERAL

/s/Joy A. Stubbs
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Ramon Armas Borroto X27467 at Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026-1230 on this 23rd day of August, 2006.

/s/ Joy A. Stubbs
Assistant Attorney General